SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~739~~ 43

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EVERETT C. MCKEAGE,
Chief Counsel,
HAL F. WIGGINS,
Senior Counsel,
Attorneys for
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
514 State Building,
San Francisco 2, California.

INDEX

Subject Index

Table of Authorities Cited

Cases

STATUTES—CODES

(California)

(United States)

Resolutions—Applications—Decisions

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission

---

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Public Utilities Commission of the State of California, et al., respondents and appellees (hereinafter referred to as Commission), for its statement in opposition to statement as to jurisdiction herein of Southern Pacific Company, petitioner and appellant (hereinafter referred to as Southern Pacific), and in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of the Facts

Southern Pacific, an intrastate and interstate common carrier of freight and passengers by railroad and/or motor vehicles between points in California, including the Cities of Glendale and Los Angeles, crosses certain streets and highways of said State, including the crossing at grade of Los Feliz Road (Boulevard) in said cities.

The Commission is the duly constituted and acting authority of the State of California having regulatory jurisdiction over all public utilities, including railroads and other transportation companies, with the exclusive power and duty to determine and prescribe grade crossing separations and, within its discretion and judgment, to apportion, divide, or allocate the expenses or costs therefor. (Sections 17, 1⁄ 23a of Article XII of the Constitution of California; the Public Utilities Act, Statutes 1915, Chapter 91, as amended; and the Public Utilities Code, Statutes 1951, Chapter 764, as amended.)

This matter concerns an existing main line railroad-highway grade crossing at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road in Glendale and Los Feliz Boulevard in Los Angeles. The tracks, consisting of two standard gauge main tracks, one standard gauge passing track and two standard gauge yard tracks, run in a northwesterly-southeasterly direction, while Los Feliz, designated as a road in Glendale and a boulevard in Los Angeles, runs in a northeasterly-southwesterly direction. The boundary line between the two cities parallels the tracks in the area of the intersection. Four of the above-mentioned tracks are in Glendale, and one, a spur track, is in Los Angeles. The grade crossing is designated as Crossing No. B-476.8, and the legal description of that portion in Glendale is as follows:

That portion of the right-of-way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, page 214, and in Book 17837, page 49, Official Records in the office of the Recorder of Los Angeles County, California.

The legal description of that portion of the grade crossing in Los Angeles is as follows:

A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with the southwesterly line of the Southern Pacific main line right-of-way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the northwesterly line of said Los Feliz.

The authority of this Commission to make grade crossing separations and apportion or allocate the costs therefore as herein involved stems primarily from Section 1202 of the Public Utilities Code, *supra*, from which we quote:

"1202. The Commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the con-

struction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivisions affected." Former Sec. 43(b), 1st sent.)

The Cities of Glendale and Los Angeles, California, alongside and on whose boundary lines the instant Los Feliz Road (Boulevard) grade crossing is situated, are parties of real interest herein.

That on May 7, 1951, the said City of Glendale filed with said Commission Application No. 32385 requesting an order authorizing the construction of a grade separation at the above-described crossing, including a designation of the portions of the work and construction to be done by Glendale, Los Angeles and the Southern Pacific, respectively, as well as an allocation of the costs thereof.

Subsequent thereto (September 25, 1951) the Commission in P. U. C. Case No. 5327 issued an Order of Investigation to determine whether or not, "in the interest of public safety, convenience and necessity," the grade separation should be constructed and also to determine "the proportions in which the expense of constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of the State of California, or other political subdivisions affected * * * *".

This Los Feliz grade crossing had long since attained prominence through its "top priority" position with the Los Angeles County Grade Crossing Committee and the fact that the California Legislature, at its 1949 Session, by House Resolution No. 24, directed the Commission to initiate proceedings with a view to such separation. This was

followed by the Commission's report to that Body on March 6, 1950, setting forth the results of an engineering study showing the estimated cost, economic justification, and problems of its financing.

Additionally, at its 1951 Session, said California Legislature, by Assembly Concurrent Resolution No. 88, directed the Commission to hold hearings on Los Feliz crossing separation, and this Commission's investigation (P. U. C. Case No. 5327, *supra*) was instituted accordingly.

Public hearings were held in Los Angeles on October 3, November 1 and 29, 1951, evidence was adduced and all matters submitted on briefs by the parties, in the course of which three alternative plans (including overpass versus underpass) for the proposed grade separation were duly considered, the Commission having finally adopted underpass construction with a gravity storm drain as the cheapest of the three proposed plans as detailed in the record.

Suffice it to state that upon a full consideration of the entire record, the Commission found said Los Feliz grade crossing separation to be entirely practical and in the interest of public safety, convenience and necessity and, pursuant to powers conferred and duties prescribed, apportioned and divided the cost allocations among the parties as follows:

> "1. Of the total cost of the proposed structure, as set out in the foregoing opinion which is estimated to be $1,493,200, fifty per cent (50%) shall be borne by the Southern Pacific Company, twenty-five per cent (25%) by the County of Los Angeles, twelve and one-half per cent (12½%) by the City of Glendale, and twelve and one-half per cent (12½%) by the City of Los Angeles."

In so doing, the Commission in its instant Decisions Nos. 47420 and 47597, which Southern Pacific here assails, wholly

affirmed its previous holdings in such matters wherein it had clearly set forth the law when it stated:

> "There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.
>
> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion." (*Erie Railroad Company* v. *Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis*, 1914, 232 U.S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company* v. *Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161.) (Also, *Cincinnati, I. & W. R. Co.* v. *Connersville* (1910) 218 U. S. 336, 54 L. ed. 1060; *State ex rel. Alton R. Co.* v. *Public Service Commission (Mo.)* (1934) 70 S. W. (2d) 57, 60; *Northern Pacific R. Co.*, v. *Minnesota ex rel. Duluth* (1907) 208 U. S. 583, 52 L. ed. 630; *Penn.-Reading S. Lines* v. *Board of P. U. Com., etc.*, (1951) 81 A. (2d) 28; Affirmed 82 A. (2d) 774.)

Complete supporting details surrounding both factual and legal conclusions are embraced within pages 778 to 798, inclusive, of Decision No. 47420, Application No. 32385, Case No. 5327, as reported in 51 Cal. P. U. C. 788, and appended to petitioner-appellant's Statement as to Jurisdiction, hence not further detailed herein.

In brief, applicant contended that all costs should be borne by the railroad owing to the latter's obstruction of the highway, while the railroad [Southern Pacific] contended for the so-called "benefits" theory of payment of only such costs as would yield to it a direct monetary benefit or return.

The Commission, however, basing upon the entire record, did not subscribe to either of the foregoing contentions, but affirmed its prior holdings in these words, to-wit:

> "While the railroad [Southern Pacific] contended that costs should be assessed according to the so-called 'benefits' theory, we affirmed our holding in Decision No. 47344, dated June 24, 1952, in Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow this so-called 'benefits' theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad. * * *" (P.U.C. Decision No. 47420, pages 795-796, *supra.*)

Petitioner-appellant, Southern Pacific, concedes the feasibility, desirability, and propriety of the instant Los Feliz grade separation, which crossing has already reached its capacity. In fact, it admits the public interest and over-all benefits in which it automatically shares, but objects to

the Commission's four-way allocation of costs among the beneficiaries directly involved.

Furthermore, it concedes the elimination of the increasingly aggravated and costly pedestrian, vehicular, train, and other delays upon this major traffic artery, as the official record confirms, but asserts that the railroad cannot benefit from these results. To quote petitioner-appellant:

> "* * * Indeed to the extent that competitive traffic (including that moving in private automobiles) using Los Feliz, or other affected roadways, is enabled by this improved facility to move faster or move more cheaply, petitioner is damaged instead of benefited."

And, based upon such a premise, it dismisses instanter the entire subject of public safety, welfare, convenience and necessity involved and proceeds on a so-called "benefits" theory to whittle away its proportional allocation to a paltry minimum, which latter it has described to the Court as being "a contribution against will". Strange logic, indeed, to come from one of the most extensive and intensive railroad-highway operators throughout the entire State of California.

To the contrary, on page 49 of its Answer to Petition for a Writ of Review, this Commission specifically set forth a dozen examples of enumerated benefits which would inevitably flow directly to Southern Pacific as a result of the Los Feliz crossing separation, all of which stand uncontroverted in the record and are doubly enhanced when considering the state-wide motor vehicle operations (freight-passenger-express) of its well-known subsidiaries operating throughout California.

And, owing to petitioner-appellant's assertion of unrelated assessment to benefits or monetary savings to the railroad, the Commission staff studies set up accrual estimates covering vehicular delay, railroad operating costs,

gatemen, maintenance, accident damages paid by the railroad, the depreciation on the railroad's portion of the structure and maintenance thereof, excluding track, and reflecting net annual savings of some $63,279.00, which savings, capitalized at 3%, 4%, or 5% [1] would produce $2,109,000, $1,582,000, and $1,266,000, respectively.

II. Statement of Issues on Appeal

In brief, that Commission Decisions Nos. 47420 and 47597 of June 30 and August 19, 1952, respectively, *supra*, are unconstitutional in violation of (1) the due process and equal protection clauses of the 14th Amendment, (2) commerce clause (~~Art. I, Sec. 8, Par.~~ 3) and (3) the National Transportation Policy (54 Stats. 899).

III. No Substantial Federal Question is Presented by the Attempted Appeal

Preliminary Statement

At the expense, perhaps of too great detail, we have endeavored to make clear factual developments and procedures surrounding the "top priority" status, by which statewide attention has focused upon Los Feliz crossing in the general public's demand for relief.

Also, that the Commission, in apportioning the cost of constructing the instant grade separation as between the several parties directly involved, gave due consideration to the obligations of each, as well as to the benefits derived (51 Cal. P.U.C. 771, 781), even though by weight of judicial decision hereinbefore cited, the element of direct benefit is immaterial. The Commission commented respecting the direct benefits which obviously would accrue to Southern

---

[1] The then current cost of obtaining money on long-time basis by Southern Pacific.

Pacific, in brief, enumerating, amongst others, longer trains, use of tracks for storage, use of streets as "feeder", elimination of accident claims, new structures and improved drainage, also, improved good will.

Nashville Case Completely Distinguishable from Case at Bar

Nevertheless, Southern Pacific disclaims such benefits would exceed its own estimated annual net benefit to the railroad of $5,917, and attacks this Commission's Decisions Nos. 47420 [2] and 47597 [3] of June 30 and August 19, 1952, respectively, alleging unconstitutionality and assigning as error its allegations of (a) unrelated costs to rail benefits; (b) absence of safety factors; (c) enhancement of motor vehicle transport; and (d) that cost assessments are not responsive to the evidence. And for support in the foregoing inexplicable stand, it admittedly relies on the single unique and completely distinguishable case of *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 404, the so-called *Nashville* case, which, as hereinafter shown, affords no parallel to the instant case at bar.

As the record confirms, the *Nashville* case is wholly dissimilar, both as to governing facts and the applicable law from the instant Los Feliz grade separation case, and as presently explained, the two basically and fundamentally different situations are in nowise comparable. Furthermore, as we have summarized in the course of briefing the record, it has been amply demonstrated that there is no logical or legal basis for the contention that the costs of the instant Los Feliz grade separation be borne by the parties respectively in accordance with the pecuniary benefits derived by them nor are any such benefits mathematically

[2-3] Appendices A and B, respectively, Appellant's Statement as to Jurisdiction.

calculable, even as the highly important factor of improved *good will,* but which, admittedly, is difficult of precise monetary evaluation.

By the great weight of judicial decision above cited, the element of direct benefit is absolutely immaterial. As stated by the Commission, it is one of the factors for consideration but not necessarily a controlling factor. Thus, to cite petitioner-appellant, Southern Pacific's one and only case relied upon herein, it was expressly recognized by the Honorable Court at page 964 of said *Nashville* case:

> "It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost." (Citing cases.)

Accordingly, we have uniformly contended that the *Nashville* case is no authority for the inference or contention by petitioner-appellant that the law has now been changed so that railroads cannot be required to pay the cost of grade crossing separations.

As was stated by the Honorable Supreme Court of the United States in the *Nashville* case (79 L. ed. 964):

> " • • • No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

The claim of unconstitutionality in that case rests wholly upon the special facts shown. Therefore, the issue as to what portion of the cost should be borne by a railroad in a grade separation such as we are concerned with in the case at bar was not even an issue in the *Nashville* case.

The railroad conceded that in such a case it would be required to pay the entire cost.

And we respectfully submit that the only point decided by the Supreme Court of the United States was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case; that all the Supreme Court of the United States did was to remand the case to the Tennessee court for consideration of those special facts; that the Supreme Court of the United States did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead, it expressly stated that it was not making such a determination, which was in the first instance for determination of allocation of costs by the Tennessee court (p. 985).

The evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider appear at length in pages 956-961, *supra*, a brief synopsis of which shows that the construction of the new highway with the underpass was not designed to meet local transportation needs, nor upon consideration of local safety needs, but that the requirement of the underpass, and the payment of the Railway under the 1921 Tennessee Act of one-half the cost of separating the grades were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass (79 L. ed. 956-961).

In other words, the underpass there involved was constructed in order to qualify for Federal funds, not to meet local traffic needs and attendant safety, convenience and necessity as in the case at bar.

As a matter of fact, and as the record shows, the two separate highways in the *Nashville* case and the two widely separated crossings there involved (being a quarter of a

or more apart) are separately operated today just as tofore with neither in anywise supplanting the other, merely a new transcontinental super-highway route blished.

is makes it abundantly clear that the Supreme Court e United States did not intend that the *Nashville* case ld be considered as reversing the long line of prior , *supra*, setting forth the railroads' continuing obliga- and responsibility in connection with grade separations.

roads' Continuing Obligation to Help Provide Safe d Adequate Crossings Over Their Tracks, at Grade Separated Grade

titioner-appellant, Southern Pacific, has stated that Commission has adopted the so-called "benefit theory" proper basis for the apportionment of costs, but the ions cited by it do not support such contention.

e *Goshen Junction case*, 38 C. R. C. 380 (1933) involved te highway to be paid in part with Federal-aid funds ighway construction, in the course of which the Com- ion took cognizance of the then existing depression expressly gave consideration to "the economic situa- particularly at this time when revenues from prac- y all sources are materially below what they have been e immediate past". Said facts are borne out by the mission's Decision No. 25069 of August 15, *1932*, for ple, as reported in 37 C. R. C. 784, 786-787, and in h it specifically repudiated the so-called "benefits y" of apportioning grade separation costs in these s:

"The matter of direct financial benefits is not the ole test in the determination of the respective portions which the railroad and public should contribute toward he cost of such improvement. In apportioning the

cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. *It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.*" (Emphasis added.)

Other citations of the kind by petitioner appear so widely different, factually speaking, as to neither require nor admit of detailed analysis herein.

If the foregoing be what petitioner-appellant has alluded to in its Statement as to Jurisdiction as new versus old Commission policies, it should here be stated that the more than 40 years of this Commission's administration of grade crossings in California show a range of variation in cost allocations among the several carriers and other parties involved of from zero % to 100% according to the governing circumstances and conditions.

And the fact must not be overlooked how petitioner-appellant has studiously avoided stating to the Court that not only has Los Feliz crossing already reached its capacity with over 27,000 motor vehicles using said crossing daily (plus multi-thousands of riders therein), but Exhibit No. 2, Part IV, of the official record shows by actual test period counts that an average of 620 pedestrians also daily use said crossing; hence the conclusions and findings in the interest of "public safety, convenience and necessity," as well as for the most practicable construction, and further, that the proposed construction neither embraces a state highway nor Federal-aid funds but is dependent upon local funds. Throughout this entire "profits" theory, of course, as interpreted by petitioner-appellant, threads the assump-

tion that its railroad has the right-of-way over Los Feliz grade crossing, and that vehicular and pedestrian traffic must at all times yield to said railroad.

Nor should it be forgotten that the leading cases prior to, during, and since the so-called *Nashville* case support the controlling principles of law whereby a railroad company takes its charter subject to the power of the State to provide for the safety of the public, and tracks of the railroad are laid subject to the condition necessarily implied, that their use could be so regulated by competent authority as to ensure said public safety, welfare, convenience and necessity.

Also, that such railroad, when thus accepting privileges and franchises granted in its charter, must be deemed to have taken into account expenses which might thereafter be incurred by reason of an order of the Public Utilities Commission compelling the necessary installations for its safe operation at public highway crossings. (*Pennsylvania-Reading Seashore Lines* v. *Board of Public Utility Commissioners, Department of Public Utilities, et al.* (1951), 81 A. (2d) 28, 33; affirmed in 82 A. 2d 774.)

In petitioner-appellant's Statement as to Jurisdiction, Southern Pacific, for purposes of support, refers to the *Santa Fe* case (Washington Boulevard) asserting "the basic contentions advanced by the railroad in these two cases have been and are essentially the same," • • • "virtually identical". This is diametrically opposite to petitioner-appellant's reply to the answering briefs of this Commission and the Cities of Los Angeles and Glendale wherein Southern Pacific, following the California Supreme Court's action on the *Santa Fe* case (Washington Boulevard, *supra*), and we quote: "That case [Santa Fe-Washington Boulevard] differed from the case at bar [Southern Pacific-Los Feliz] in at least two important respects."

The Commission Here Considered Both the Benefits and the Obligations of the Parties Involved at Los Feliz

This latter action is strikingly corroborated in the instant Los Feliz decision wherein petitioner-appellant, Southern Pacific, reduced the engineering storm drainage estimate from $249,100 to a sump and pump which it estimated at $28,500, and which latter cheapest minimum was adopted for said drainage, the Commission finding that, "while the more elaborate gravity storm drain is desirable, yet it would provide drainage for more than the structure area [and], accordingly, the entire cost of such a storm drain should not be included in any costs which are apportioned to the railroad," hence deducted $220,600, or the difference between the said two preceding sums, and used the petitioner-appellant's own calculations in the four-way cost allocations covering this very important structure.

The Decisions of the Commission Do Not Constitute an Unlawful or Other Burden on Interstate Commerce

Petitioner-appellant asserts that the Commission's order would result in undue financial burden on interstate commerce. We submit that the Los Feliz crossing, a purely local matter, is too remote and unrelated to the Commerce Clause or the National Transportation Policy to call for reply.

The mere fact that Southern Pacific is engaged in interstate as well as intrastate commerce has no significance so far as the validity of the instant order of the Commission is concerned.

Petitioner-appellant does not categorically assert that a State has no authority to burden or regulate interstate commerce but it might be inferred that such contention is being made by petitioner from the propositions advanced by it. We desire to call to the Honorable Court's attention the rule laid down by the Supreme Court of the United

States that a State may, lawfully, *burden* interstate commerce and regulate it so long as State authority does not discriminate against such commerce. (*South Carolina State H. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. ed. 993, 998; *Railway Express Agency* v. *New York*, 336 U. S. 106, 111, 93 L. ed. 533, 539; *Kelly* v. *Washington*, 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13; *Cities Service Gas Co.* v. *Peerless O. & G. Co.*, 340 U. S. 179, 186, 95 L. ed. 190, 202.)

And it has long been held by the United States Supreme Court that until such time as the Congress pre-empts the entire field of regulation, both interstate and intrastate common carriers and utilities are subject to state regulation insofar as intrastate operations are concerned, even though their operations are regulated by federal authority. *Cooley* v. *Board of Port Wardens* (1851) 12 Howard (U. S.) 299, 12 L. ed. 996; *Minnesota Rate* cases (1913) 230 U. S. 352, 57 L. ed. 1511; *Eicholz* v. *Public Service Commission* (1939) 306 U. S. 268, 83 L. ed. 641; *Smith* v. *Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. ed. 255; *Lindheimer* v. *Illinois Bell Telephone Co.* (1934) 292 U. S. 151, 78 L. ed. 1182.

And it is common knowledge respecting presently enhanced financial condition of Southern Pacific by which its net operating results have attained all-time peaks. Also, that the record herein establishes no claim by it of any impairment of its ability to render adequate transportation services—both intrastate and interstate—nor is there any showing whatsoever that the instant order impinges on the National Transportation Policy of the Congress. (*South Carolina State H. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Comm.*, 341 U. S. 329, 333, 95 L. ed.

993, 998. *Alabama P. S. Com.* v. *Southern R. Co.*, 341 U. S. 341, 95 L. ed. 1002; *North Carolina* v. *United States*, 325 U. S. 507, 511, 89 L. ed. 1760, 1765.)

Petitioner-appellant's departures from the official record herein (as also occurred in its earlier briefing and to which departures we directed attention of the Court) have ranged far afield in the use of outside railroad propaganda in confusion of the record and in attempted support of its advocated "benefits" theory. Similar action has characterized its treatment of purported state legislative trends and in reply to which we quote the Cities of Los Angeles and Glendale—parties in real interest herein—to wit:

> "Petitioner [Southern Pacific] has argued that the trend nationally is toward allocating costs of grade separation on the basis of benefits. It would probably be more accurate to say that in recent years the railroads have successfully secured passage of legislation by more and more states relieving them of their legal obligation to provide adequate grade crossings." (Los Angeles-Glendale Joint Brief, p. 40.)

Similarly, petitioner-appellant's Statement as to Jurisdiction has devoted much space to the historical of antiquated versus modern transport which, we believe, lacks pertinency herein. If there be any point to all such, it is Southern Pacific's oblivion respecting the antiquity of its own "iron horse" whose movements at the intersection not only blockade Los Feliz thoroughfare, but for the railroad's perpetuation of which it manually raises and lowers the gates 70 or more times daily.

All told, it seems perfectly clear that the motivating purpose is and the obvious result of Southern Pacific's attack would be the ultimate defeat, through prolonged and futile negotiations, of any and all future grade separation relief owing to the highly controversial character of the impracticable benefits theory which it here seeks to obtain.

And just as we have said before and as we here reiterate, that mindful of the history of Commission grade crossing procedures, it is doubly apparent that the petitioner-appellant's rail benefits theory here urged would be a perversion of grade crossing regulation as it exists in California, and would virtually nullify the present constitutional and statutory mandates of this State.

IV. Conclusion and Motion to Dismiss or Affirm

In conclusion, we respectfully submit that whether the Commission's prescribed duty of specifically allocating Los Feliz grade separation costs among the parties here involved (the only point in controversy) be strictly viewed as a legislative or judicial function (of which this Commission under powers conferred exercises both), the fact remains that the questions presented in this attempted appeal have long ago been so definitely settled and so continuously affirmed by the Courts since, that no substantial questions are presented by this appeal entitling Southern Pacific to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee and respondent respectfully moves that the within appeal be dismissed, or that the judgment and decree of the Supreme Court of the State of California denying petition for a Writ of Review and the decisions and orders of the Commission be affirmed.

Dated, San Francisco, California, April 10th, 1953.

Respectfully submitted,

EVERETT C. MCKEAGE,
HAL F. WIGGINS,
Counsel for Appellee and Respondent,
PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA.